

The Principle of Confidentiality in the Law of Evidence and Professional Ethics

September 28, 2021

47th Annual Workers
Compensation Seminar

Tom Stratton
Deputy Disciplinary Administrator
785-435-8200

Don't Be Scared...Be Prepared

For practicing lawyers there are things scarier than an ethics complaint...but an ethics complaint is scary enough.

2021 Kan. S. Ct. R. 225 Types of Discipline

(a) Misconduct may be disciplined by:

- (1) Disbarment...
- (2) Indefinite Suspension...
- (3) Suspension for a Definite Period...
- (4) Probation...
- (5) Censure...
- (6) Informal Admonition
- (7) Any other form of discipline or conditions...
which the Supreme Court deems appropriate



If you get something from the Disciplinary Administrator, open it!

It is your duty to assist in investigations and communicate any information you may have concerning complaints of misconduct.
2021 Kan. S. Ct. R. 210

“Misconduct” is defined in Kan. S. Ct. R. 201 (n) as “...an act or omission by an attorney, individually or with another person, that violates the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney’s oath of office.”



**Kansas Rules of
Professional
Conduct (KRPC)
8.1 Bar
Admission and
Disciplinary
Matters
imposes
obligations...**

... which if not met can result in discipline!

KRPC 8.1 says lawyers in connection with a disciplinary matter shall not (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension...or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority...

KRPC 8.3 Reporting Professional Misconduct also imposes obligations

KRPC 8.3 says, at (a), that a lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.

**To learn more about lawyer obligations under the
KRPC, please see:**

<https://casetext.com/rule/kansas-court-rules/kansas-rules-relating-to-discipline-of-attorneys/rule-240-rules-of-professional-conduct>



Or call us at 785-435-8200

Or email us at attydisc@kscourts.org

Confidentiality - Ethics

Rule 1.6 - Client-Lawyer Relationship:
Confidentiality of Information



(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

The attorney-client privilege (which includes the work product doctrine) in the law of evidence.

K.S.A. 60-426 Attorney-client privilege; K.S.A. 60-426a - Attorney-client privilege and work product; limitations on waiver

K.S.A. 60-426(a) *General rule.* Subject to K.S.A. 60-437, and amendments thereto, and except as otherwise provided by subsection (b), communications found by the judge to have been between an attorney and such attorney's client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege: (1) If such client is the witness, to refuse to disclose any such communication; (2) to prevent such client's attorney from disclosing it; and (3) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness...

Definitions

K.S.A. 60-426a(f):

- (1) “Attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications.
- (2) “Work-product protection” means the protection that applicable law provides for tangible material, or its intangible equivalent, prepared in anticipation of litigation or for trial.

K.S.A. 60-426a

- (a) *Disclosure made in a court or agency proceeding; scope of waiver.* When the disclosure is made in a court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if...
- (b) *Inadvertent disclosure.* When made in a court or agency proceeding, the disclosure does not operate as a waiver in any proceeding if:
- (1) The disclosure is inadvertent;
 - (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - (3) the holder promptly took reasonable steps to rectify the error, including, if applicable, following subsection (b)(7)(B) of K.S.A. 6-226, and amendments thereto.

See also subsections (c)-(f)

And now, a question culled from our Ethics Refreshers*

Sign up at:
attydisc@kscourts.org

*Thanks to Deborah
Hughes

John was arrested for DUI and hires you to represent him. Since John is unemployed, his father, a long-time business client of your firm, agrees to pay your fee. A few days after your first meeting with John, his father calls you and asks questions about John's defense and the anticipated outcome of the case. You should:

- a. Discuss the case with his father.
- b. Discuss the case with his father as long as you do not disclose privileged communications.
- c. Discuss the case with the father on the condition that he share the information with his son.
- d. Decline to discuss the case with the father because he is not the client and information related to the case is confidential.

In re Bryan,
275 Kan. 202,
61 P.3d 641
(2003)

This case addresses the need to maintain client confidentiality after the attorney-client relationship has concluded.

In
McDonald
v. City of
Wichita,
Kansas,
USDC Kan,
2016 WL
30536...

...Magistrate Judge Birzer
provided support for her
application of the duty of
confidentiality, including:

Heckman v. Zurich Holding Co.
of Am., No. 06-2345-KHV, 242
F.R.D. 606 (D. Kan, 2007)
(citing *In re Bryan*).

A district court judge's decision on a motion to quash a subpoena is reviewed on appeal for abuse of discretion.

In a murder prosecution, after a subpoena was issued to require the public defender to disclose the identity of a former client who had expressed an intention to commit perjury in the case, the District Court found the defender in direct civil contempt when she refused to answer questions regarding former client's identity. Defender appealed.

Did the contempt stand?

State v. Gonzalez,
290 Kan. 747,
234 P. 3d 1 (2010)

State v. Gonzalez, 290 Kan. 747, 234 P. 3d 1 (2010)

Basis for the *Gonzalez* decision:

After transferring the appeal from the Court of Appeals, the Supreme Court, Justice Beier stated the burden of a prosecutor when seeking a client's confidential information from defense counsel.

State v. Gonzalez, 290 Kan. 747, 234 P. 3d 1 (2010)

Basis for the *Gonzalez* decision,
continued:

1. Crime and fraud exception to attorney-client privilege did not apply;
2. Defender could not be compelled to testify to reveal client's identity;
3. State failed to establish that it had no feasible alternative other than seeking to subpoena defender.

Other cornerstone cases cited in *Gonzalez*:

United States v. Colorado Supreme Court,
189 F.3d 1281 (10th Cir.1999) and cases cited therein.

Another Ethics Refresher question...

Husband and Wife want you to jointly represent them in a divorce. They claim to be in complete agreement on all issues and do not want to waste money by hiring two attorneys. Husband and Wife offer to waive any conflict of interest. You:

- A. May ethically represent both Husband and Wife in the divorce if each client gives informed consent, confirmed in writing.
- B. May ethically represent both Husband and Wife in the divorce if you advise each client to seek independent counsel regarding any conflict and if each client gives informed consent confirmed in writing.
- C. May not ethically represent both Husband and Wife in the divorce, even if they consent and waive any conflict of interest.
- D. May ethically represent both Husband and Wife in the divorce if each client gives informed consent, confirmed in writing, and there is no significant risk that your representation will be materially limited by your representation of the other client.

There's still a vein to be mined in the Gonzalez case...attorney work product.

“Rule 3.8(e)(1)’s near-total prohibition on subpoenas directed to an attorney to obtain evidence protected by privilege reinforces the indispensability of attorney-client privilege in the effective and efficient functioning of the administration of justice.”
Gonzalez, p. 761

Gonzalez cites *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct.677, 66 L.Ed.2d 584 (1981) and other authorities, stating:

“The attorney-client privilege is the oldest of the common-law privileges and exists ‘to encourage full and frank communication between attorneys and their clients’ in order to ‘promote broader public interests in the observance of law and administration of justice.’”



Time to refresh

Another Ethics Refresher:

You represent Acme Kibble Company, a leading pet food manufacturer. Acme's products include Acme Reindeer Chow. About a week before Christmas, the president of Acme tells you the company has learned the last batch of Acme Reindeer Chow may have been contaminated with rat poison during the manufacturing process. The president tells you the company has decided not to issue a recall and is giving you a heads-up that he wants you to handle the claims when they come in later.

You also represent Santa Claus. You know from your meetings with Mr. Claus at his North Pole headquarters that he feeds his reindeer Acme Reindeer Chow. Naturally, you want to alert Mr. Claus about the potentially-tainted food, particularly since it is just days before Christmas Eve. You:

- A. May reveal the information under the exception to KRPC 1.6 that allows disclosure of confidential client information to prevent reasonably certain death or substantial bodily harm.
- B. May not reveal the information to Mr. Claus.
- C. May have your law clerk provide the information through an anonymous call to Mr. Claus.
- D. May casually suggest to Mr. Claus that he should switch his reindeer to another brand of reindeer food right away.

They're not all complicated #1: *In re Diaz*, 295 Kan. 1071, 288 P.3d 486 (2012)

Judge advocate who revealed confidential information and transmitted classified documents regarding individual detainees at Guantanamo Bay violated KRPC 1.6(a) and other provisions of the KRPC.



Feeling refreshed yet?

MAYBE ANOTHER REFRESHER?

Your office needs a new associate. The top candidate currently works for a law firm that represents a client adverse to a current client of your firm. When interviewed, the candidate stated she knows nothing about the common case. You contacted the candidate's firm and they confirmed that she has not had any involvement in the case and would have no confidential information about it. You may:

- A. Not hire this candidate under any circumstances because it would create a conflict of interest.
- B. Hire this candidate but will need to screen her from the common case.
- C. Hire this candidate if you have the informed consent of your client, confirmed in writing.
- D. Hire this candidate without the necessity of the consent of your client.

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They're not all complicated #2: *In re Harding*, 290 Kan. 81, 223 P.3d 303 (2010)

Respondent, a City Attorney, should not give information to and then consult with the County Attorney regarding whether City Officials had violated the law. He shouldn't give confidential information regarding his clients to the local paper, either.

And another...



Yes or no?

Your client, Jane, told you that her previous lawyer, John, pressured her for sex in lieu of payment of the balance due on her attorney fees. Jane said she agreed because she did not have the money to pay the overdue bill for fees. Jane has text messages from John that she saved on her phone that support her story.

You told Jane she should report John to the disciplinary administrator's office, but she refused. Jane insisted that you not report it, either. Should you report John even though your client told you not to?

They're not all complicated #3: Crandon v. State, 257 Kan. 727, 897 P.2d 92 (1995)

General counsel who reported suspected violations to an outside agency without first consulting with the head of the organization found in violation of MRPC 1.6(a) and other provisions of the MRPC.

Just one more...



Back in 1893, an attorney who was associated with your firm was the court-appointed attorney who represented Emmett Dalton, of the infamous Dalton Gang. Emmett Dalton was charged with first-degree murder for his part in the gang's failed attempt to rob two banks at the same time in Coffeyville, Kansas. The Dalton Gang's Coffeyville raid has been the subject of several books, including one written by Emmett Dalton himself, as well as a Hollywood movie.

You discovered the file one day when you were searching in storage for another file. Curious, you looked through the file and saw letters to and from Emmett and his attorney, many photographs, and notes of witness interviews. Realizing the historical value of the file, you proposed to the partners that the firm donate the file to the Dalton Defenders Museum in Coffeyville. May the firm donate the file to the museum?

- A. No. KRPC 1.6 protects the confidentiality of Emmett Dalton's client file.
- B. Yes, except for the letters between Emmett and his attorney. The letters are protected by the attorney-client privilege, which survives the death of the client.
- C. Yes. The duty of confidentiality expires 50 years after the death of the client.
- D. Yes. Due to the publicity about the case over the years, all information in the file has been previously disclosed or is publicly available and therefore confidentiality no longer applies.



Thanks for attending.